2-12-1976

Insurance Company of North America, et al. v. Dr. John Froning

Appellant's Brief 1976-SC-0010

APPELLANT'S BRIEF

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SUPREME COURT OF KENTUCKY

No. 76-10

INSURANCE COMPANY OF NORTH AMERICA, et al. - - - -Appellants

versus

DR. JOHN FRONING - - - - - Appellee

APPEAL FROM THE OLDHAM CIRCUIT COURT
HON. GEORGE F. WILLIAMSON, JUDGE

BRIEF FOR APPELLANTS

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This is to certify that this brief has been served upon the adverse party and the trial judge, pursuant to RCA 1.250, by mailing copies to Mr. Bruce R. Hamilton, and the Hon. George F. Williamson, on February 12, 1976.

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SUPREME COURT OF KENTUCKY

No. 76-10

INSURANCE COMPANY OF
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versus

DR. JOHN FRONING *Appellee*

APPEAL FROM THE OLDHAM CIRCUIT COURT
HON. GEORGE F. WILLIAMSON, JUDGE

BRIEF FOR APPELLANTS

May it please the Court:

STATEMENT OF THE QUESTION PRESENTED

Were the appellants denied their right, under the Constitution and statutes of the United States[1], to have the lower court give full faith and credit to the appellants' Ohio judgment?

STATEMENT OF THE CASE

A. Statement of the Nature of the Proceeding

This action was brought in the Oldham Circuit Court to recover upon an Ohio judgment rendered in favor of the appellants and against the appellee in the

[1] U. S. Const. art. 4, §1; 28 U.S.C. §1738.

sum of $3,597.68 plus costs. The lower court held the Ohio judgment void on the ground that personal service of process was insufficient.

B. Statement of the Facts

(Since the lower court dismissed this action on the ground that service of process in Ohio was insufficient as a matter of law, the appellants can only assume that the court accepted as true the averments contained in their various pleadings, affidavit, and deposition, for the purpose of determining that the action should be dismissed as a matter of law.[2])

On Saturday evening, February 3, 1973, the appellee, Dr. John Froning, went to Cincinnti, Ohio and ate at the Kabuki Restaurant, which is a Japanese restaurant owned by the appellant, Eurasian Enterprises, Inc. (TR 63).

Dr. Froning and his party were seated at a U-shaped table with a grill in the center; other couples and groups were also seated around this table. All cooking is done on the grill, with the cooks putting on a "show" while preparing the food. The grill is usually kept warm and dishes, tea and saki are kept warm on the grill while rice, sauces and the like are put on the table itself. Service is normally good to the point of being over-attentive and it was good on the evening of February 3, 1973 at Dr. Froning's table (TR 63).

Dr. Froning had been served his meal along with the members of other groups seated at the table. He had become loud and boisterous during the evening and he suddenly stood up and seized an overhead ring marked

[2]Cf. CR 12.03 and 12.04; *Spencer* v. *Woods* (1955), Ky., 282 S.W.2d 851.

"Pull For Fire Only," stating, "Hey, let's see what happens when we pull this thing!" Dr. Froning then yanked the ring (which requires a downward pull of approximately forty-five pounds) and activated the fire extinguisher system, causing everyone and everything in the restaurant to be covered with foam and powder. The restaurant was forced to close, losing for that evening alone, income from about 300 customers who had made reservations but had not yet arrived, as well as from an undetermined number of "walk-ins". In addition to loss of profits, the restaurant incurred the expense of cleaning the restaurant and the clothing and property of its patrons (TR. 63).

The appellant, Eurasian Enterprises, Inc., subsequently assigned all but $50.00 of its claim to its insurance carrier, the appellant, Insurance Company of North America, and suit was then filed by both appellants against Dr. Froning in the Hamilton County (Ohio) Municipal Court on September 10, 1973 (TR 4). The complaint filed in that action alleged in part (TR 31-32) that Dr. Froning was a customer in the Kabuki Restaurant and that the damages were due to the carelessness and negligence of Dr. Froning in activating the fire alarm system.

Service of process was obtained over Dr. Froning under the "long-arm" jurisdiction provisions set out in 8 Baldwin Ohio Revised Code, Rules of Civil Procedure, Title II, Rule 4.3, which is comparable to Kentucky statute KRS 454.210, and states as follows (TR 74-75, and 78):

"(A) When service permitted.

"Service of process may be made outside of this state, as provided herein, in any action in this state, upon a person who at the time of service of process is a nonresident of this state or is a resident of this state who is absent from this state. The term 'person' includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim which is the subject of the complaint arose, from the person's:

(1) Transacting any business in this state;

(2) . . .;

(3) Causing tortious injury by an act or omission in this state including but not limited to actions arising out of the ownership, operation or use of a motor vehicle or aircraft in this state;

. . . ."

After service of process was made upon Dr. Froning in the precise manner required by Ohio Rules of Civil Procedure (TR 75), and after Dr. Froning had signed the postal receipt (TR 83) for the process and complaint issued by the Hamilton County (Ohio) Municipal Court, Dr. Froning's lawyer then filed in the Ohio court a Motion to Dismiss for lack of jurisdiction (TR 8-9). Dr. Froning's lawyer then notified the Ohio court and appellants' counsel that he had received the Memorandum and Response filed in behalf of the appellants and that Dr. Froning's defense would be presented "to a court with the proper venue and jurisdiction to determine the matter." (TR 6).

The Ohio court overruled Dr. Froning's Motion to Dismiss and gave him twenty-eight days to file an

answer (TR 4). Dr. Froning's lawyer then gave notice that "no further action in the courts of Ohio" was planned (TR 7). Consequently, on December 28, 1973, the Ohio court entered a judgment in behalf of the appellants against Dr. Froning for the amount of their claims.

On March 28, 1974, the appellants brought suit upon the Ohio judgment in the lower court, filing the record and judgment of the Ohio court, attested by the clerk in due form, with the seal of the court annexed, and certified by the judge (TR 1-10 and 31-32). The lower court examined (TR 65-66) this record and judgment of the Ohio court and concluded on August 12, 1975, that the judgment of the Ohio court "is void because the service of process was insufficient as a matter of law to give the Court personal jurisdiction over the defendant . . . ." (TR 88).

ARGUMENT

THE OHIO JUDGMENT SHOULD BE GIVEN FULL FAITH AND CREDIT BY THE KENTUCKY COURTS, AS REQUIRED BY THE CONSTITUTION AND STATUTES OF THE UNITED STATES.

This type of action upon the judgment of a sister state is well-known to this Court. *Dudley* v. *Lindsey* (1849), 48 Ky. (9 B. Mon) 486; *Gebhard* v. *Garnier* (1876), 75 Ky. (12 Bush) 321; *Montgomery* v. *Consolidated Boat Store Co.* (1903), 115 Ky. 156, 72 S.W. 816, 103 Am. St. Rep. 302; *Dant* v. *Progress Paint Manufacturing Company* (1958), Ky., 309 S.W.2d 187. Indeed, *Montgomery, supra,* concerned a judgment rendered in Hamilton County, Ohio, just as the judgment now before this Court!

The Constitution of the United States provides in part:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. 4, §1.

In accordance with this mandate, Congress has provided, in part:

> "Such . . . judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C.A. §1738.

KRS 422.040 provides essentially the same thing.

At this point, it is necessary to examine the jurisdictional basis for the Ohio judgment. As set out at TR 78, the Ohio "long-arm" provision is comparable to that of Kentucky's KRS 454.210 (compare, also, the nonresident motorist statute, KRS 188.010). Each state provides for jurisdiction over a "nonresident . . . causing tortious injury" "by an act or omission" within the state. The principal difference is that the Kentucky statute creates a fictional agency in the Secretary of State who in turn notifies the defendant by mail; while the Ohio provisions eliminate this fictional agency and provides for direct notice to the nonresident by certified mail. This distinction was commented upon by the Supreme Court of Ohio in *Kilbreath* v. *Rudy* (1968), 16 Ohio St.2d 70, 242 N.E.2d 658, at 661:

> ". . . The consent or agency fiction in long-arm statutes has since been recognized as fiction, and consequently rendered less important. See Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673; Bruney v. Little, 8 Ohio Misc. 393, 222 N.E.2d 446, and Retroactive Expansion of State Court Jurisdiction over Persons, 63 Columbia Law Review 1105, 1114 . . . ."

Professor Moore discusses the broader State long-arm and minimum-contact statutes in 2 Moore's Federal Practice (2d ed. 1974) beginning at page 1291.50, where he states:

> "The emerging statutes took different forms. Some retain the requirement common to the nonresident motorist acts of service upon a state official, although the concurrent notice to the defendant, required if such service is to comport with due process, is also provided. Others, generally of a more recent vintage, *dispense with this seemingly empty ritual, and provide for service to be made directly on the nonresident defendant, either personally or by mail . . .*" (Emphasis supplied).

Indeed, Ohio's provision for notice mailed directly to the nonresident is similar to that of Arizona's requirement, which has also been upheld in *Executive Properties, Inc.* v. *Sherman* (D. Ariz. 1963), 223 F.Supp. 1011; *Powder Horn Nursery, Inc.* v. *Soil & Plant Lab. Inc.*, (1973), 20 Ariz. App. 517, 514 P.2d 270.

Both the Kentucky and the Ohio long-arm provisions have been construed, at least in part, to extend personal jurisdiction to the full constitutional limits of the Due Process Clause. *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.* (6th Cir. 1972), 466 F.2d 220 at 225; *Davis H.*

Elliot Co., Inc. v. *Caribbean Utilities Co., Ltd.* (6th Cir. 1975), 513 F.2d 1176 at 1180-1181. Therefore, the sole question to be determined is whether or not personal jurisdiction over Dr. Froning is consistent with the Due Process Clause of the Fourteenth Amendment, *supra*, 513 F.2d at 1179. The appellants will consider this question solely in the light of Dr. Froning's single act in causing a tortious injury in Ohio—and will disregard, *arguendo,* Dr. Froning's voluntary appearance in Ohio and his patronage of the Kabuki Restaurant, inasmuch as there is ample authority that the commission of a single tort is, alone, a sufficient basis for *in personam* jurisdiction.

A leading case in support of the appellants' position is *McGee* v. *International Life Ins. Co.* (1957), 355 U.S. 220, 2 L.Ed.2d 223, 78 S.Ct. 199, where Mrs. McGee brought suit on a life insurance policy against the nonresident insurance company in a California state court. *The nonresident insurance company never had any office or agent in California, and, apparently, had never solicited or done any insurance business in California*—apart from the McGee policy. Process was served upon the nonresident insurance company *by registered mail* addressed to its principal place of business in Texas. Judgment was then rendered in favor of Mrs. McGee and she then filed suit on the California judgment in a Texas court; however, both the lower court and the appellate court in Texas held the California judgment void under the Fourteenth Amendment on the ground that the service of process outside California had not given the California court jurisdiction over the nonresident insurance company. In reversing the Texas

appellate court, the United States Supreme Court pointed out, *supra,* 355 U.S. at 222:

> " '[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." '
>
> "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part, this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more states and may involve parties separated by the full continent . . ."

In a footnote, 355 U.S. at 223, the Supreme Court cited approvingly certain cases, including *Smyth* v. *Twin State Improv. Corp.,* 116 Vt. 569, 80 A.2d 664, 25 A.L.R.2d 1193, where the Supreme Court of Vermont upheld "long-arm" jurisdiction over a nonresident corporation alleged to have committed a *single tort* within the state. In a thorough opinion, the court said, *supra,* 80 A.2d at 668, and 25 A.L.R.2d at 1200:

> ". . . To require a resident to commence his action in a foreign jurisdiction on a tort committed where he lives, and to transport his witnesses to such other state might well make protection of his right prohibitive and in effect permit a foreign corporation to commit a tort away from its home with relative immunity from legal responsibility . . .

> [Cases cited.] In many instances the cost of the remedy would have largely exceeded the value of its fruits. Without such a statute as V.S. 1947, §1562, a defendant could say to his plaintiff that the issue between them over acts done at the plaintiff's home could be settled in only one of two ways, first by accepting the defendant's contention about it, or second, by suing the defendant in his own bailiwick . . ."

Mr. Justice Goldberg wrote in *Rosenblatt* v. *American Cyanamid Co.* (1965), 86 S.Ct. 1 at 3, 15 L.Ed. 39 at 43:

> ". . . The logic of this court's decisions in International Shoe Co. v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057 and McGee v. International Life Ins. Co., 355 U.S. 220, 2 L.Ed.2d 223, 78 S.Ct. 199, supports the validity of the state 'long arm' statutes such as the one involved here which base in personam jurisdiction upon commission of a 'tortious act' in the forum State. Since those decisions, a large number of States have enacted statutes similar to the one here. In cases under these statutes in state and federal courts, *jurisdiction on the basis of a single tort has been uniformly upheld*:
>
> " 'Indeed, the constitutionality of this assertion of jurisdiction, today, could only be doubted by those determined to oppose the clear trend of the decisions. This sitution is exactly that of the nonresident motorist statutes, which were long ago upheld, except that the highways are not directly involved. It is now clear, if it was ever in doubt, that the nonresident-motorist cases were not really based on "consent" but on the interest of the forum State and the fairness of trial there to the defen-

dant.' Currie, The Growth of the Long-Arm, 1963 U. Ill. Law Forum 515, 540." (Emphasis supplied.)

Other cases upholding the "long-arm" jurisdiction of a state over a non-resident who has committed a tort within the state, are as follows: *Terasse* v. *Wisconsin Feeder Pig Marketing Coop.* (1967), La. App., 202 So.2d 330; *Goltzman* v. *Rougeot* (W.D. La. 1954), 122 F.Supp. 700; *Nelson* v. *Miller* (1957), 11 Ill.2d 378, 143 N.E.2d 673; *Hardy* v. *Bankers Life & Casualty Co.* (1958), 19 Ill. App.2d 75, 153 N.E.2d 269; *Gray* v. *American Radiator & Standard Sanitary Corp.* (1961), 22 Ill.2d 432, 176 N.E.2d 761; *Owens* v. *Superior Court* (1959), 52 Cal.2d 822, 345 P.2d 921; *Elkart Engineering Corporation* v. *Dornier Werke* (5th Cir. 1965), 343 F.2d 861; *Rosenlund* v. *Transnational Ins. Co.* (D. Oregon 1964), 237 F.Supp. 599; *Stuart* v. *Burford* (N.D. Okla. 1967), 264 F.Supp. 191; *Newman* v. *Fleming* (S.D. Ga. 1971), 331 F.Supp. 973; *Mountain States Sports, Inc.* v. *Sharman* (D. Utah 1972), 353 F.Supp. 613; *Texair Flyers, Inc.* v. *District Court, First Judicial District* (1973), Colo., 506 P.2d 367; *Knight* v. *San Jacinto Club, Inc.* (1967), 96 N.J. Super. 81, 232 A.2d 462; *Saratoga Harness Racing Asso.* v. *Moss* (1966), 49 Misc.2d 855, 268 N.Y.S.2d 619; *Karsh* v. *Karsh* (1970), 62 Misc.2d 783; 310 N.Y.S.2d 578; *Polish* v. *Threshold Technology, Inc.* (1972), 72 Misc.2d 610, 340 N.Y.S.2d 354; *Poindexter* v. *Willis* (1970), 23 Ohio Misc. 199, 256 N.E.2d 254; *Jasper Aviation, Inc.* v. *McCollum Aviation, Inc.* (1972), Tenn., 497 S.W.2d 240; *Jones* v. *Davis* (1970), La.App., 233 So.2d 310, 256 La. 80, 235 So.2d 101; *McAlpin* v. *James McKoane Enterprises, Inc.* (N.D. Miss 1975), 395 F.Supp. 937; *McCoy* v. *Wean United, Inc.* (E.D. Tenn. 1973), 67 F.R.D. 491;

Inc., (E.D. Tenn. 1973), 67 F.R.D. 491; *Alliance Alliance Clothing Ltd.* v. *District Court* (1975), Colo., 532 P.2d 725.

In *Newman* v. *Fleming, supra* 331 F.Supp. 973, the federal court followed the liberal construction now being given to the long-arm provisions of the various states, stating in part:

> "It is easier to obtain jurisdiction over a nonresident tort feasor than over a nonresident wrongdoer in fields other than torts. In the latter instance, jurisdiction is posited under the statute on the defendant's transacting any business in this State (Ga. Code Ann. §24-113, 1(a)) and in such cases Due Process must be satisfied by the existence of 'minimal contacts' of the nonresident in the state in which he is sued . . . [Cases cited.]
>
> "Jurisdiction over nonresidents in tort actions carries no such impedimenta. The minimum contacts requirement does not have to read into the language 'Commits a tortious act or omission within this state.' Where a nonresident enters a state and commits a tort, no showing of continuous activity in the jurisdiction is required. *Jurisdiction is sustained by the commission of a single tort* . . . [Cases cited.]" (Emphasis supplied.)

It seems clear that this is the proper construction to be given both to Ohio's long-arm provision, and to Kentucky's long-arm statute, KRS 454.210. See KRS 188.010, *et seq.*

CONCLUSION

The judgment of the Oldham Circuit Court should be reversed with directions to enter a judgment in favor of the appellants, as required by the Full Faith and Credit Clause of the United States Constitution.

Respectfully submitted,

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